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No. 94-1922

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., *et al.*,
Appellants,

v.

NED MCWHERTER, Governor of Tennessee, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Tennessee

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MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

STATEMENT

Appellants in this case filed suit claiming that Tennessee's 1992 districting plan for its State Senate violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, by failing to provide "additional majority-black seats in the state senate for west Tennessee." J.S. App. 1. The State's plan included—in addition to one majority-black district in Nashville, which was not at issue—two majority-black districts in Shelby County (containing Memphis). Appellants sought the creation of two additional majority-black seats in southwest Tennessee, one to be located in Shelby County and one to be located in selected portions of Shelby County plus four (originally, six) surrounding counties. *See Rural W. Tenn. African-American Affairs Council v. McWherter*, 836 F. Supp. 453 (W.D. Tenn.

1993) (*RWTAAAC I*), *vacated and remanded*, 114 S. Ct. 2775 (1994).[1]

The three-judge district court, in its initial ruling, held that Section 2 entitled appellants to one additional majority-black seat in western Tennessee. *Ibid.* As the district court subsequently described that first holding, the court "focused on statewide proportionality rather than regional proportionality in west Tennessee," discounted the relevance of the evident "influence" districts in the State's plan (*i.e.*, districts where black voters, though not a majority, are a sizable group with substantial influence on elections), and "required substantial statewide proportionality of majority-black districts to black voting-age population." J.S. App. 2, 1. On appeal, this Court vacated the judgment and remanded for reconsideration in light of *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994). *See* 114 S. Ct. 2775, 2776 (1994).

On remand, the district court reversed itself and held that the State's plan did not violate Section 2. J.S. App. 1-35. Most importantly, the court now concluded that "the voluntary creation of influence districts by a legislature should be counted as a factor weighing against finding a § 2 violation . . . in evaluating the totality of the circumstances." *Id.* at 11; *see id.* at 11-20. The court found that appellants had not demonstrated that their proposed plan—which would substitute a single majority-black district for two of the three strong influence districts created by the State's plan (districts with black voting-age population of at least 30%, J.S. App. 20-24) —"would reduce vote dilution. To the contrary, it appears as though black voters might have more influence on the legislative process with two strong influence districts than they would with one additional majority-

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[1] Appellants' two successively proposed "rural" districts (the multicounty districts, not wholly within Shelby County) are shown on maps included at pages 35a-36a of the appendix to the jurisdictional statement in No. 93-1108, filed by the state officials after the district court's initial ruling.

minority district." J.S. App. 24 (footnote omitted).[2] In these circumstances, the court ruled, where the State's plan in fact created three majority-black districts in addition to the several influence districts, appellants had not carried their burden of demonstrating (to quote Section 2), "based on the totality of circumstances, . . . that the political processes leading to nomination or election in the State . . . are not equally open to participation by [black citizens] in that [such citizens] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" (42 U.S.C. § 1973(b)). J.S. App. 24-25.[3]

In accord with this fuller analysis of the factors relevant to Section 2, the district court next abandoned its previous rigid focus on proportionality of the number of majority-black districts to relevant black-population figures, concluding "that § 2 of the Voting Rights Act does not require proportionality." J.S. App. 25. The court observed that this Court in *DeGrandy* had explained that the importance of any particular degree of proportionality depends on the full facts of a case. J.S. App. 27 (quoting 114 S. Ct. at 2661 n.17; *id.* at 2664 (O'Connor, J., concurring)). In this case, the district court ruled, "once we include influence districts in the calculus, the lack of proportionality is not significant enough to compel a holding that the 1992 Plan violates the Voting Rights Act." J.S. App. 30-31.

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[2] The district court later made the same point: "creating an additional majority-minority district at the expense of two or more districts with significant black population would not necessarily enhance black influence in the state senate and reduce vote-dilution. Instead, amending the 1992 Plan to add another black district might have the opposite effect." J.S. App. 34.

[3] The court observed that its ruling on influence districts did "not imply that the legislature could adopt a plan under current circumstances with no majority-minority districts at all if it created a sufficient number of influence districts." J.S. App. 24 n.11.

Finally, the court revisited the dispute over whether the proportionality analysis should concentrate on numbers from the State as a whole or on numbers from the region where proof was introduced on the threshold conditions under *Thornburg v. Gingles*, 478 U.S. 30 (1986)—here, seven counties in western Tennessee. J.S. App. 31-34. The court observed that "virtually all of the evidence presented in this case concerned west Tennessee" and that it "should have evaluated more closely regional statistics in [its] earlier decision." *Id.* at 31. Noting at least two different ways of figuring the regional numbers in assessing the degree of proportionality, at least one of which reflected a lack of proportionality, the court ultimately concluded: "[w]hen we include the influence districts in our analysis of the 'totality of the circumstances' we find that both methods of regional analysis yield findings that § 2 has not been violated." *Id.* at 34.

REASONS TO DISMISS OR AFFIRM

The jurisdictional statement presents two issues for review, one involving the relevance of influence districts to Section 2 "totality of circumstances" analysis and the other involving the use of voting-age population and/or total population in measuring proportionality as one element in that analysis. J.S. i. Neither issue presents a ground for plenary review of the judgment of the three-judge district court. Indeed, in their effort to find a path around applicable law, appellants have so refined their contentions that they have stated issues not actually presented by the decision below. *See* notes 5, 10, *infra*. In any event, the district court's rulings are manifestly correct under *Johnson v. DeGrandy*, and there is no division among the lower courts warranting this Court's review.[4]

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[4] Appellants do not even cite any contrary authority on their "total population" issue. J.S. 26-28. On the "influence district" issue, the district court in this case noted the absence of any other authority. J.S. App. 11. Appellants cite three decisions as supposedly creating a conflict that warrants review (J.S. 16-17), but

The ultimate judgment of the district court finding no Section 2 violation is not clearly erroneous. *See DeGrandy*, 114 S. Ct. at 2662; *Gingles*, 478 U.S. at 79. The judgment should be affirmed or the appeal dismissed.

1. Appellants' predominant contention is that the district court mistakenly relied on the existence of several strong influence districts (which would be partly eliminated by the additional majority-black district appellants propose) in finding, based on the "totality of circumstances" (42 U.S.C. § 1973(b)), that appellants had failed to prove a violation of Section 2. J.S. 10-26. Appellants themselves appear to recognize, however, that the presence of influence districts *is* a proper consideration in Section 2 analysis. J.S. 11 n.2. That proposition is undoubtedly correct under *DeGrandy*, and it is not clear what other *legal* principle appellants can plausibly claim the district court adopted or, for that matter, what principle appellants urge this Court to announce instead.[5] In

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there is no conflict at all, much less a live one: not one of the three cited decisions holds that influence districts can never be an important factor in defeating a claim of vote dilution, and any such suggestion would not, in any event, warrant review in light of the subsequent decisions of this Court making any such view insupportable, *i.e.*, *Chisom v. Roemer*, 111 S. Ct. 2354 (1991), *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), and *DeGrandy*—all discussed below.

[5] In trying to distinguish the legal principle they accept from some other principle they challenge, appellants state that the district court treated influence districts as "simply a substitute for effective minority voting districts." J.S. 11 n.2. That claim is plainly wrong. The district court explicitly and repeatedly treated influence districts as a factor—an important fact in this case—in the overall "totality of circumstances" analysis. *E.g.*, J.S. App. 11, 13, 15, 17, 24, 30-31, 34. Moreover, as appellants recognize (J.S. 25-26), the court expressly disclaimed any notion that influence districts were a simple substitute for majority-black districts, indicating that its reliance on influence districts depended on the fact that the Senate plan *also* provided for majority-black districts. J.S. App. 24 n.11. Thus, the proposition that appellants challenge in their jurisdictional statement is not in fact the premise

any event, once it is clear that influence districts are a proper, potentially important factor in the "totality of circumstances" analysis, and that proportionality of electoral results as counted by numbers of majority-minority districts is not the effectively dispositive issue under Section 2, there simply is no basis for deeming clearly erroneous the district court's fact-specific finding that appellants in this case had failed to prove that the State Senate plan denied them "equal political opportunity" (*DeGrandy*, 114 S. Ct. at 2658)—where the plan created several majority-black districts, at a level not far from proportionality in the region at issue (J.S. App. 31-34), and also created several substantial additional influence districts, which provided at least as much political influence for black voters as, and perhaps more than, appellants' proposed plan (*see, e.g.*, J.S. App. 22, 24, 34).

Appellants' entire challenge rests on the contention, reflected throughout its jurisdictional statement, that Section 2 analysis requires an essentially exclusive focus on the number of seats "guaranteed" by majority-minority districts, separate and apart from a broader inquiry into minority opportunities for electoral and political participation, as by influencing elections through forming alliances with other voters. But that rigid view of Section 2 was incompatible with applicable law even before *DeGrandy*: the statutory text itself requires a broad "totality of circumstances" inquiry into whether the State's electoral processes are "equally open to participation by [black citizens] in that [such citizens] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" (42 U.S.C. § 1973(b)); Congress rejected proportionality in favor of a self-consciously flexible and fact-intensive inquiry (*see* J.S. App. 6-7, 15-18); this Court has recog-

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of the district court's decision—a reason for dismissing the appeal as to the first question presented.

nized that the voting strength of concern in Section 2 is enhanced sometimes by *adopting* and sometimes by *rejecting* majority-minority districts in favor of influence districts (*Voinovich v. Quilter*, 113 S. Ct. 1149, 1156 (1993), quoted at J.S. App. 13); and the Court also has expressly ruled that diminished "opportunity to participate in the political process" is a necessary part of any Section 2 claim and, contrary to appellants' pervasive submission (*e.g.*, J.S. App. 11, 13, 19), is *not* to be divorced from the "opportunity to elect" (*Chisom v. Roemer*, 111 S. Ct. 2354, 2365 (1991)).[6] And if there was any remaining uncertainty prior to *DeGrandy* about the incorrectness of appellants' view of the decisive importance of the numbers of majority-minority districts, there can be none after *DeGrandy*, which is starkly inconsistent with appellants' position.

The Court in *DeGrandy* began by reiterating that proof of the three *Gingles* preconditions was not sufficient to establish a Section 2 violation (114 S. Ct. at 2657) and then went on to discuss the "totality of circumstances" analysis that is required. The Court explained that "the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts. Lack of electoral success is evidence of vote dilution, but courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes." *Ibid.* Noting that the focus of the statutory inquiry was "equal political opportunity" judged

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[6] The Court said in *Chisom*: "the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights." 111 S. Ct. at 2365. The Court specifically stated that it was not proper under Section 2 "to separate the opportunity to participate from the opportunity to elect." *Ibid.*; *see also id.* at 2365 n.24. *See* J.S. App. 14.

in light of "the totality of facts," the Court concluded that "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority preferred candidates of whatever race." *Id.* at 2658 & n.11. Because of the required broad, multi-factor focus on " 'the totality of circumstances' " (*Id.* at 2660, quoting Section 2), the Court held that proportional electoral success as guaranteed by majority-minority districts does not decide Section 2 cases: the absence of such proportionality does not establish a violation, and its presence creates no safe harbor; rather, the probative value of the number of majority-minority districts, whether equal to or short of proportionality, depends on other facts varying from case to case. *Id.* at 2660-61 & n.17. *See also id.* at 2664 (O'Connor, J., concurring) ("Lack of proportionality can never by itself prove dilution, for courts must always carefully and searchingly review the totality of the circumstances, including the extent to which minority groups have access to the political process.").

The reason for this fact-specific focus of Section 2, the Court explained (echoing *Voinovich, supra*), is that Section 2 may be undermined rather than fulfilled by an across-the-board insistence on sufficient numbers of majority-minority districts: the Court condemned the "tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity." *Id.* at 2661. Accordingly, although majority-minority districts are "sometimes" necessary under Section 2, "there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." *Ibid.*[7] The Court thus made clear (echoing

[7] "Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue

Chisom, supra) that the statutorily protected opportunity "to elect" is not dependent on majority status in a district —a ruling directly contrary to appellants' contention that the right to elect, allegedly separate from any right to participate in the political processes, mandates majority-minority districts in preference to influence districts.

The Court's ruling in *DeGrandy*—with its rejection of any rigid focus on guaranteed majority-minority districts in favor of a fact-specific weighing of *all* relevant facts—shows that appellants' challenge to the district court's analysis in this case is plainly incorrect. Nothing about that challenge, moreover, warrants plenary briefiing and argument. Not only is there no live conflict on the issue (*see* note 4, *supra*), but there is no relevant legal principle for the Court to clarify beyond what *DeGrandy*, with its unmistakable commitment to a "totality" standard, itself made clear. The district court's decision here relied on no "radical new concept" under Section 2 (J.S. 26), but on an approach whose validity under Section 2 was made crystal clear by *DeGrandy*.

All that would be left for this Court upon plenary consideration, therefore, is a review of the particular findings made by the district court based on that court's deep familiarity with the political realities in the State at issue. But those findings are well grounded in the record.[8]

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of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics." *Ibid.*

[8] The State Senate plan (with its 33 seats) includes, in addition to three majority-black districts, three districts with more than 30% black voting-age population (the "influence districts" under the district court's standard) as well as two other districts with more than 20% black voting-age population. J.S. App. 23. Relying on the three influence districts in combination with the three majority-black districts, the district court based its finding of lack of proved vote dilution on its assessment of the electoral opportunities of black voters, citing a statistical analysis of recent elections and the specific testimony from two State Senators demonstrating the electoral influence of black voters outside the majority-black districts. J.S. App. 19-24.

Appellants have advanced no basis on which those findings could reasonably be reversed (under the clearly erroneous standard of review).[9] Accordingly, appellants' first question presented supplies no basis for anything but a summary affirmance of the decision of the district court (or dismissal of the appeal).

2. Appellants' second question presented asks this Court to grant plenary consideration to decide that "total population is *a* proper measure of proportionality in this case." J.S. 26 (emphasis added). *See* J.S. 26-28. Notably, appellants now carefully avoid claiming that voting-age population is an *improper* measure of proportionality; they merely fault the district court for not *also* examining proportionality in light of total-population figures, which are slightly different (*see* J.S. 27). This argument provides no basis whatever for review of the district court's judgment.

First, appellants can point to no passage in the district court's opinions in this case that reject the argument appellants now make. *See* J.S. App. 4 and *RWTAAAC I*,

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[9] Appellants' efforts to undermine the factual finding of no vote dilution begin with a discussion of certain political-science commentary having nothing to do with the particular circumstances of this case. *See* J.S. 20-21. When appellants turn to this case, their main point is to allege that a State Senator testifying as to influence districts misreported a particular vote in the Tennessee Senate as an example. J.S. 22. But this criticism is woefully inadequate to undermine the district court's finding: the criticism focuses on only a single example cited by the Senator in support of his broadly based testimony to the point at issue—that black voters in influence districts *do* influence the elections and legislative behavior of himself and comparably situated Senators. *See* J.S. App. 21-23. Appellants' only other fact-specific contention is criticism of the strength of the evidence of recent elections showing the power of 25% voting blocs. J.S. 23-24. But appellants merely complain that the evidence did not break out black/white voting or specific influence districts, without themselves undertaking to perform the analysis they say should have been performed. Such naked speculation about what other evidence might show does not destroy the value of the evidence introduced, much less undermine the overall finding of the district court.

836 F. Supp. at 462, the two passages cited by appellants (J.S. 26). The reason is not mysterious. Appellants have never before made this argument in their filings in the case.[10] The district court's first opinion, rejecting the quite different argument that total population must be chosen *to the exclusion of* voting-age population, is not an opinion resting on, or precedent for, rejection of appellants' new contention that both measures should be considered if the court is asked to do so. Appellants, in short, are challenging the judgment below on a ground not reflected in the opinion of or argued to the lower court.

Second, and in any event, unless appellants are repeating the same rigid overemphasis on a precisely measured proportionality as infects their argument against influence districts, their argument for review and reversal on this second basis necessarily rests on the assertion that a mild change in one factor in the analysis would wholly transform the district court's judgment that no vote dilution was proved in this case. That assertion is worse than speculative. Given that the degree of departure from proportionality is only one factor in the "totality of circumstances" analysis (J.S. App. 25-31); that the district court found no vote dilution despite noting a departure from voting-age proportionality (J.S. App. 29, 33-34); and that the numerical differences at issue are small (*see* J.S. 27), it is simply implausible to suggest that the district court's "totality of cirmumstances" finding of no vote dilution would turn around 180 degrees if express addi-

[10] Appellants did not argue on remand to the district court that, if voting-age population figures were going to be considered, total-population figures should *also* be considered. Instead, as in their jurisdictional statement on appeal from the district court's original decision, appellants argued on remand that "total *rather than* voting age population of African-Americans is the proper measure of proportionality in this case." Plaintiffs' Brief on Remand at 4 (filed Aug. 26, 1994) (emphasis added). *See also* 93-1379 J.S. i (Question 1: "Whether, under Section 2, total population, rather than voting age population, is the appropriate numerical basis for judging the representative fairness of a redistricting plan"). The appeal as to the second issue should be dismissed on this ground.

tional consideration were given to the slightly greater degree of departure from total-population proportionality. Indeed, the implausibility of that suggestion is confirmed by appellants' failure to argue in its brief to the district court that, even if a proper consideration of voting-age proportionality does not support a finding of vote dilution here, consideration of total-population proportionality as well nevertheless should and would alter that "totality of circumstances" assessment in this case. There is no reason for this Court to grant plenary review of this fact-specific, new, and unlikely claim.

Third, and finally, the district court's focus on voting-age population is neither incorrect nor in need of review. As the district court here observed, this Court has noted "the prevalence of [the voting-age population] standard with approval." *RWTAAAC I*, 836 F. Supp. at 463, citing *Growe v. Emison*, 113 S. Ct. 1075, 1079 (1993), itself citing *Romero v. Pomona*, 883 F.2d 1418, 1425-26 (9th Cir. 1989) (listing cases), and *Gingles*, 478 U.S. at 48, 50. A focus on voting-age population, even an exclusive focus, accords with Section 2's guarantee of *voting* rights. Moreover, any difference there may be in practice between an exclusive and a primary focus on voting-age population is not likely to be important to overall results in light of the diminished importance of proportionality after *DeGrandy*. Certainly, there is no reason to think that the difference is important in this case and hence no reason to grant plenary review on the issue here.[11]

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[11] We note that, if the Court were to grant plenary review, two additional grounds for affirming the judgment would be presented, drawn from the State's initial jurisdictional statement. First, the degree of proportionality when properly measured on a regional basis is greater than the district court recognized. *Compare* J.S. App. 31-34 *with* 93-1108 J.S. 11-12. Second, a Section 2 claim cannot properly be premised on failure to create a proposed majority-minority district, such as those appellants defined, that is drawn on the basis of race in derogation of traditional districting principles. *See* 93-1108 J.S. 13-18; *cf. Miller v. Johnson*, 63 L.W. 4726 (U.S. June 29, 1995) (constitutional standards).

CONCLUSION

The judgment of the district court should be summarily affirmed or the appeal dismissed.

Respectfully submitted,

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